101ST CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
101-273

MAJOR FRAUD ACT AMENDMENTS OF 1989

OCTOBER 6, 1989.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 248]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the Act (S. 248) to amend title 18 of the United States Code to provide increased penalties for certain major frauds against the United States, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

BACKGROUND

The history of procurement fraud in this country and particularly in the defense procurement area is documented in numerous Congressional, Department of Justice and Department of Defense investigations over the last two decades. These investigations highlighted successive scandals in spare parts, overhead overcharges, malfunctioning equipment, produce substitution, bribery, and similar fraudulent schemes, born of greed in the private sector and inefficiency and acquiescence by the Federal Government. This led the Congress to pass the Major Fraud Act in the 100th Congress. This Act (H.R. 3911—Public Law 100-700) established a new specific Federal offense involving contracts of $1 million or more. (See House Report 100-610 and Senate Report 100-503).

Unfortunately, the bill as finally enacted did not contain a House provision which would have established a new system of rewards of up to $250,000 for information. These rewards would have been paid from the criminal fine to individuals who provide information leading to conviction under this statute. This information is crucial to prosecution in procurement fraud cases since one of the major deficiencies in past cases was the lack of sufficient informa-

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tion available to the prosecutors of these complex and often secretive transactions.

In 1988, the House version of the Major Fraud Act which contained this crucial provision passed unanimously at both the Subcommittee and full Committee levels in the Judiciary Committee and passed the House of Representatives by a vote of 419–0. The Senate version of this bill without this provision passed during the last few days of the 100th Congress, and time constraints prompted the House to accept this version, which became law.

The Senate in the 101st Congress has moved to address this omission by passing S. 248 on April 5, 1989 by a vote of 82–16. (See Senate Report 101–7). S. 248 as reported by the Committee on the Judiciary is identical to the Senate version. It allows the Attorney General in his discretion "in special circumstances" to make payments of up to $250,000 for information. The Attorney General may then request the court to reimburse the Department of Justice from the criminal fine.

This concept of allowing rewards for information leading to conviction is not new to the Federal system. In fact, it is rather commonplace.

For example, as early as 1899, Congress authorized courts to pay one-half of a criminal fine to a person giving information leading to the conviction for wrongful deposit of refuse, injury to harbor improvements or obstruction of navigable waters. (33 U.S.C. § 411) Both the FBI and DEA have general authority to give awards for information (FBI—31 U.S.C. 5323 and 22 U.S.C. 2708, DEA—21 U.S.C. 886(a)) which they utilize on a regular basis.

The Attorney General is presently authorized to give rewards for information on drug trafficking from the drug forfeiture fund (28 U.S.C. § 524); for information on fugitives (18 U.S.C. § 3059); terrorism (18 U.S.C. § 3071 et al.); and assassination of the President (18 U.S.C. § 1751).

The Secretary of Treasury has very broad authority to pay rewards for services and information leading to the apprehension of persons involved in the violation or potential violation of laws which the Secret Service enforces (18 U.S.C. § 3056(c)(1)(D)).

This proposed provision is also analogous to the "Qui Tam" provision of the False Claims Act under which a private person can receive at least 15 percent and up to 25 percent of a civil judgment of fraud against a defendant even if the government takes over the prosecution of the civil action. The provision contained in S. 248 should encourage these individuals to initially come to the government rather than filing a separate civil suit under the False Claims Act. In essence this proposed reward provision would give the government an important new tool to fight procurement fraud, a tool which is available for fighting other crimes. It is the judgment of the Committee on the Judiciary that the crime problem in this nation is not just a matter of violent street crime or drug trafficking. White collar crime, of which procurement fraud is one of the most pernicious and costly, must remain one of the Federal Government's highest priorities.

This rewards provision will enable the government to more effectively maintain its commitment in this area.

The legislation enacted last year includes two conflicting provisions dealing with attorneys' fees in procurement cases. Through oversight, both versions were enacted into law, and S. 248 merely makes a technical correction.

SECTION-BY-SECTION ANALYSIS

The following is a section-by-section analysis of S. 248, as reported by the Committee on the Judiciary.

Section 1 of the bill contains its short title, the Major Fraud Act Amendments of 1989.

Section 2(a) adds a new subsection (g) to § 1031 of Title 18, U.S.C.

Subsection (g) first establishes a new reward authority to be used "in special circumstances" by the Attorney General to make payments of up to $250,000 from appropriated funds to persons who furnish information relating to possible prosecution under the Major Fraud Act. It also allows the Attorney General, when appropriate, to make an application to the Court to reimburse the Department of Justice for the reward from the criminal fine imposed upon a convicted defendant. This provision is a change from the 1988 House passed version and the Senate Judiciary version which allowed the payment of up to $250,000 to an individual who furnished information only if there was a conviction. The amount under the prior provision was to be paid from the fine and had to be proposed by the Attorney General and approved by the Court. This subsection leaves the payment of the reward completely up to the discretion of the Attorney General and was crafted to alleviate the concern of the Department of Justice and others who thought a reward contingent on conviction would tend to be a vehicle for impeaching any prosecution witness in these cases.

Subsection (g)(2) sets out a number of instances where an award is precluded, including cases where:

(1) the individual is an officer or employee of the government who furnishes information or renders services in the performance of official duties. This is a standard exclusion for reward provisions;

(2) individuals who discover fraud within their organization and fail to alert appropriate management personnel in a timely fashion. The Committee by this provision intends to emphasize that it encourages responsible individuals, when feasible, first to go to their employers with pertinent information whether the employee discovers the fraud before or after it is consummated. The Committee opposes any reward or incentive to an employee who failed to act promptly to avoid the commission or continuation of a fraud. This proviso is consistent with private industries' laudable attempts at self-governance;

(3) the information is based upon public disclosure of facts already revealed in a hearing or investigation "unless the person is the original source of the information" and has voluntarily provided the information to the government; or

(4) those who participate in the violation would be recipients of the rewards.

The above four prohibitions are meant to be guidelines for the Attorney General.

Subsection (g)(3) states that the Attorney General's decision whether or not to authorize a reward shall not be subject to judicial review.

Section 2(b) makes this rewards provision applicable to contracts entered into on or after the date of the enactment of this Act.

Section 3 is a technical amendment and deletes Section (3) of the Major Fraud Act which remained in H.R. 3911 as a result of a drafting error. This technical amendment is made effective as of November 19, 1988.

COMMITTEE ACTION

On October 3, 1989, the Committee, by voice vote, a quorum being present, ordered the bill, S. 248, reported favorably without amendment.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

STATEMENT ON BUDGET AUTHORITY AND RELATED ITEMS

In compliance with clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, the Committee reports that no statement under section 308(a)(1) of the Congressional Budget Act of 1974 is required.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, S. 248, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 5, 1989.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 248, the Major Fraud Act Amendments of 1989, as ordered reported by the House Committee on the Judiciary, October 3, 1989. CBO estimates that enactment of this legislation would have no significant impact on the federal budget and would result in no costs for state or local governments.

S. 248 would authorize the Attorney General, in special circumstances, to pay rewards to individuals who furnish information leading to convictions under the Major Fraud Act of 1988, which concerns procurement fraud. These rewards would be paid from funds appropriated to the Department of Justice; with court ap-

proval, any such payment may be reimbursed from criminal fines collected under the fraud statutes. While these payments would entail some federal costs, such a system could also result in savings if it would encourage individuals to come forward with information about procurement fraud. CBO has no basis for estimating the number or amount of rewards that would be paid under this provision, but the amounts involved are not likely to be substantial.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Michael Sieverts, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

OVERSIGHT FINDINGS OF COMMITTEE ON GOVERNMENT OPERATIONS

In accordance with clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee states that, with respect to the subject matter of the bill, the Committee on Government Operations did not submit to the Committee findings or recommendations based on investigations under clause 4(c)(2) of rule X of the Rules of the House of Representatives.

INFLATIONARY IMPACT STATEMENT

In compliance with clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee states that the bill will have no inflationary impact on prices and costs in the operation of the national economy.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

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PART I—CRIMES

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CHAPTER 15—CLAIMS AND SERVICES IN MATTERS AFFECTING GOVERNMENT

Sec.

281. Restrictions on retired military officers regarding certain matters affecting the Government.

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[293. Limitation on Government contract costs.]

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[§293. Limitation on Government contract costs

[(a) Any proceeding costs incurred in connection with any proceeding brought by the United States or a State government that relates to a violation of, or failure to comply with, any Federal or State law or regulation on the part of the contractor are not allowable costs in a covered contract if the proceeding results in any of the following:

[(1) an indictment by a Federal grand jury, or a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of such violation or failure to comply;

[(2) the assessment of a monetary penalty by reason of a civil or administrative finding of such violation or failure to comply;

[(3) a civil judgment containing a finding of liability, or an administrative finding of liability, by reason of such violation or failure to comply, if the charges which are the subject of the proceeding involve fraud or similar offenses;

[(4) a decision to debar or suspend the contractor or rescind, void, or terminate a contract for default, by reason of such violation or failure to comply; or

[(5) the resolution of the proceeding by consent or compromise, where the penalty or relief sought by the government included the actions described in paragraphs (1) through (5).

[(b) In any proceeding brought by the United States or a State government that does not result in any of the actions described in paragraphs (1) through (5) of subsection (a), costs for legal services incurred by a contractor in connection with such proceeding shall not be allowed in excess of the rate specified in the Equal Access to Justice Act (28 U.S.C. 2412(d)(2)(A); 5 U.S.C. 504(a)) unless the responsible contracting officer finds that a special factor (such as the limited availability of qualified attorneys or agents) justifies an award of higher rates.

[(c) For purposes of this section—

[(1) the term "covered contract" means a contract for an amount more than $100,000 entered into by a department or agency of the United States other than a fixed-price contract without cost incentives;

[(2) the term "proceeding" means a civil, criminal, or an administrative investigation, prosecution, or proceeding; and

[(3) the term "proceeding costs" means all costs relating to a proceeding incurred before, during, or after the commencement of the proceeding, and such term includes—

[(A) administrative and clerical expenses;

[(B) the cost of legal services (whether performed by an employee of the contractor or otherwise);

[(C) the cost of the services of accountants and consultants retained by a contractor; and

[(D) the salaries and wages of employees, including officers and directors.]

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CHAPTER 47—FRAUD AND FALSE STATEMENTS

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§ 1031. Major fraud against the United States

(a) * * *

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(g)(1) In special circumstances and in his or her sole discretion, the Attorney General is authorized to make payments from funds appropriated to the Department of Justice to persons who furnish information relating to a possible prosecution under this section. The amount of such payment shall not exceed $250,000. Upon application by the Attorney General, the court may order that the Department shall be reimbursed for a payment from a criminal fine imposed under this section.

(2) An individual is not eligible for such a payment if—

(A) that individual is an officer or employee of a government agency who furnishes information or renders service in the performance of official duties;

(B) that individual failed to furnish the information to the individual's employer prior to furnishing it to law enforcement authorities, unless the court determines the individual has justifiable reasons for that failure;

(C) the furnished information is based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or GAO report, hearing, audit or investigation, or from the news media unless the person is the original source of the information. For the purposes of this subsection, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government; or

(D) that individual participated in the violation of this section with respect to which such payment would be made.

(3) The failure of the Attorney General to authorize a payment shall not be subject to judicial review.

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SECTION 3 OF THE MAJOR FRAUD ACT OF 1988

[SEC. 3. LIMITATION ON ALLOWABILITY OF COSTS OF CONTRACTORS INCURRED IN CERTAIN PROCEEDINGS.

[(a) IN GENERAL.—Chapter 15 of title 18, United States Code, is amended by adding at the end thereof the following new section:

["§ 293. Limitation on Government contract costs

["(a) Any proceeding costs incurred in connection with any proceeding brought by the United States or a State government that relates to a violation of, or failure to comply with, any Federal or State law or regulation on the part of the contractor are not allowable costs in a covered contract if the proceeding results in any of the following:

[“(1) an indictment by a Federal grand jury, or a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of such violation or failure to comply;

[“(2) the assessment of a monetary penalty by reason of a civil or administrative finding of such violation or failure to comply;

[“(3) a civil judgment containing a finding of liability, or an administrative finding of liability, by reason of such violation or failure to comply, if the charges which are the subject of the proceeding involve fraud or similar offenses;

[“(4) a decision to debar or suspend the contractor or rescind, void, or terminate a contract for default, by reason of such violation or failure to comply; or

[“(5) the resolution of the proceeding by consent or compromise, where the penalty or relief sought by the government included the actions described in paragraphs (1) through (5).

[“(b) In any proceeding brought by the United States or a State government that does not result in any of the actions described in paragraphs (1) through (5) of subsection (a), costs for legal services incurred by a contractor in connection with such proceeding shall not be allowed in excess of the rate specified in the Equal Access to Justice Act (28 U.S.C. 2412(d)(2)(A); 5 U.S.C. 504(a)) unless the responsible contracting officer finds that a special factor (such as the limited availability of qualified attorneys or agents) justifies an award of higher rates.

[“(c) For purposes of this section—

[“(1) the term ‘covered contract’ means a contract for an amount more than $100,000 entered into by a department or agency of the United States other than a fixed-price contract without cost incentives;

[“(2) the term ‘proceeding’ means a civil, criminal, or an administrative investigation, prosecution, or proceeding; and

[“(3) the term ‘proceeding costs’ means all costs relating to a proceeding incurred before, during, or after the commencement of the proceeding, and such term includes—

[“(A) administrative and clerical expenses;

[“(B) the cost of legal services (whether performed by an employee of the contractor or otherwise);

[“(C) the cost of the services of accountants and consultants retained by a contractor; and

[“(D) the salaries and wages of employees, including officers and directors.”.

[(b) AMENDMENT TO CHAPTER ANALYSIS.—The chapter analysis for chapter 15 of title 18, United States Code, is amended by adding at the end thereof the following:

[“293. Limitation on Government contract costs.”.]

COMMITTEE COST ESTIMATE

In compliance with clause 7(a) of rule XIII of the Rules of the House of Representatives, the Committee concurs in the estimate provided by the Congressional Budget Office and adopts that estimate as the cost estimate of the Committee.

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